

# Denver Journal of International Law & Policy

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Volume 23  
Number 3 *Summer*

Article 6

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May 2020

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### Recommended Citation

Laurence A. Grayer, A Paradox: Death Penalty Flourishes in U.S. While Declining Worldwide, 23 Denv. J. Int'l L. & Pol'y 555 (1995).

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# A Paradox: Death Penalty Flourishes in U.S. While Declining Worldwide

Laurence A. Grayer\*

This article discusses how international law and individual countries address the death penalty, with an emphasis on the United States and its comparatively unorthodox approach. The historical development and rationale behind the death penalty will be analyzed to assist in constructing a trend and to demonstrate the most probable role of the death penalty in the future. This article is also intended to be a useful resource for any practitioner with a need or desire to understand both international and United States' law and theory surrounding the death penalty. Finally, this article suggests that the United States must reevaluate its continued acceptance of the death penalty if it seeks to remain a democratic civil rights leader.

## I. INTRODUCTION

The United States' Federal Government, as well as a majority of its separate state governments, oppose the international trend moving towards the abolition of the death penalty.<sup>1</sup> The United States regularly criticizes other countries, such as Iran, Iraq, and China, for their civil rights violations, but paradoxically joins with these same countries in supporting the death penalty.<sup>2</sup> Countries that look to the United States for leadership and direction have trouble understanding the United States' reluctance to abolish capital punishment.<sup>3</sup>

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\* Associate, Margolis & Edelstein, Philadelphia, PA; D.B.A., 1992, The George Washington University; J.D., 1995, St. John's University. This article is dedicated to Samuel Nicinski, for his moral guidance.

1. Roger Hood, *The Injustice of the Death Penalty*, in AMNESTY INTERNATIONAL, *THE MACHINERY OF DEATH: A SHOCKING INDICTMENT OF CAPITAL PUNISHMENT IN THE UNITED STATES* 175, 183 (1995).

2. *Id.* at 175. In 1989, the United States voted against the adoption of the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty, and only ratified the Covenant in 1992 when a reservation was entered to the section calling for the abolition of the death penalty for those under the age of eighteen. *Id.* "A mere glance at the list of countries where executions have been carried out, shows that they are, almost without exception, countries which have been criticized for their violation of human rights by the U.S." *Id.* at 176. "One wonders, therefore, how the federal and state governments can reconcile their place among nations which execute their citizens with their claims to be upholders of human rights." *Id.* See also WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* 170 (1993).

3. See generally Hood, *supra* note 1. For "those who admire the U.S., it is disconcerting and deeply troubling to find, both at the federal level and in the majority of the states, so much resistance to the international trend which moves apace towards the abolition of the death penalty worldwide." *Id.* at 176.

The United States remains the only liberal democracy to regularly execute criminals.<sup>4</sup> As of 1994, 90 countries have abolished the death penalty either *de jure* or *de facto*, while 103 countries have retained the death penalty.<sup>5</sup> Approximately two countries per year abolish the death penalty;<sup>6</sup> and it is estimated that by the year 2000, the majority of countries in the world will have eliminated the death penalty completely.<sup>7</sup>

In contrast, the United States' Supreme Court once found the death penalty to violate the U.S. Constitution's Eighth Amendment as being cruel and unusual<sup>8</sup>, but reestablished the death penalty in 1976.<sup>9</sup> As of April 1994, there were 2,848 death row inmates in the United States,<sup>10</sup> and the number of annual executions has continued to rise steadily.<sup>11</sup> A compilation of statistics from seven states reveals that four out of every five Americans favor the death penalty.<sup>12</sup> Furthermore, of the 184 mem-

4. *Id.*

5. AMNESTY INTERNATIONAL, THE DEATH PENALTY LIST OF ABOLITIONIST AND RETENTIONIST COUNTRIES 2 (1994). A *de facto* country retains the death penalty for ordinary crimes but has not executed anyone during the past ten years or more. AMNESTY INTERNATIONAL, UN MEMBER STATES AND THEIR POSITIONS ON THE DEATH PENALTY FOR CRIMES COMMITTED BY PERSONS BELOW 18 YEARS OF AGE 10 (1994) [hereinafter DEATH PENALTY FOR CRIMES COMMITTED BY PERSONS BELOW 18 YEARS OF AGE]. Many of the states which have retained the death penalty would only use it in an extremely rare situation. David Matas, *The Death Penalty as a Violation of International Human Rights Norms*, in AMNESTY INTERNATIONAL, THE MACHINERY OF DEATH: A SHOCKING INDICTMENT OF CAPITAL PUNISHMENT IN THE UNITED STATES 35, 38 (1995).

6. William A. Schabas, *International Law and the Death Penalty*, in AMNESTY INTERNATIONAL, THE MACHINERY OF DEATH: A SHOCKING INDICTMENT OF CAPITAL PUNISHMENT IN THE UNITED STATES 22 (1995).

7. Matas, *supra* note 5 (stating that "[b]y the year 2000, the majority of states in the world will be abolitionist in law.").

8. *Furman v. Georgia*, 408 U.S. 238 (1972) (ruling that the death penalty was discriminatory, violative of the Equal Protection Clause of the U.S. Constitution, arbitrary, and irrational, thus violative of the Due Process Clause).

9. *Gregg v. Georgia*, 428 U.S. 153 (1976) (establishing the legal framework for capital punishment in the U.S., attempting to avoid the arbitrary and discriminatory nature of earlier laws).

10. NAACP LEGAL DEFENSE AND EDUCATION FUND, INC., DEATH ROW, U.S.A. 16 (1994) [hereinafter NAACP].

11. Henry Schwarzschild, *The Death Penalty in the United States: A Commentary and Review*, in AMNESTY INTERNATIONAL, THE MACHINERY OF DEATH: A SHOCKING INDICTMENT OF CAPITAL PUNISHMENT IN THE UNITED STATES 2, 6 (1995). In recent years no more than thirty people a year have been executed, but this number is increasing. *Id.*

12. CAMBRIDGE SURVEY RESEARCH, AN ANALYSIS OF ATTITUDES TOWARD CAPITAL PUNISHMENT IN FLORIDA 7 (1985); CAMBRIDGE SURVEY RESEARCH, AN ANALYSIS OF POLITICAL ATTITUDES TOWARD THE DEATH PENALTY IN THE STATE OF FLORIDA: EXECUTIVE SUMMARY 3 (1986); THOMAS AND HUTCHESON, GEORGIA RESIDENTS' ATTITUDES TOWARD THE DEATH PENALTY, THE DISPOSITION OF JUVENILE OFFENDERS, AND RELATED ISSUES 22 (1986); BUREAU OF SOCIOLOGICAL RESEARCH, NEBRASKA SURVEY: JOHNSON AND BOOTH 4 (1988); GRASMICH AND BURSİK, ATTITUDES OF OKLAHOMANS TOWARDS THE DEATH PENALTY 6 (1988); CAMBRIDGE SURVEY RESEARCH, NEW YORK PUBLIC OPINION POLL, THE DEATH PENALTY: AN EXECUTIVE SUMMARY 1 (1989); HANEY AND HURTADO, CALIFORNIANS' ATTITUDES ABOUT THE DEATH PENALTY: RESULTS OF A STATEWIDE SURVEY 34 (1989); VITO AND KELL, ATTITUDES IN THE STATE OF KENTUCKY ON THE DEATH PENALTY 1 (1989).

ber states of the United Nations, the United States is second only to Iraq in the number of executions of minors over the past ten years.<sup>13</sup> The United States has even violated international law<sup>14</sup> in the enforcement of a discriminatory death penalty.<sup>15</sup>

## II. INTERNATIONAL LAW AND THE DEATH PENALTY

A variety of sources in international law either restrict the death penalty or provide for its elimination. These comprise two categories. First, there are "optional treaties" in which countries commit themselves to the abolition of the death penalty. Second, there are "fundamental minimum human rights standards" associated with the death penalty, binding on all states by virtue of their membership in the community of nations.

### A. *Historical View of the International Abolitionist Movement*

There are several early examples of opposition to the death penalty. The first recorded parliamentary debate on the death penalty was held in 427 B.C. when Diodotus, arguing that the death penalty was not a deterrent, persuaded the Athenian Assembly in Greece to reverse its decision to execute all adult males of the rebellious city of Mitylene.<sup>16</sup> During the first century A.D., Amandagamani, the Buddhist King of Lanka, abolished the death penalty during his reign, as did several kings who seceded him.<sup>17</sup> In 818 A.D., Emperor Saga of Japan removed the death penalty from Japanese law, abolishing it for the next three centuries.<sup>18</sup>

The modern abolitionist movement is usually said to have begun in Europe with Cesare Beccaria's 1764 Italian publication, *On Crimes and Punishments*.<sup>19</sup> In 1786, based on Beccaria's ideas, Grand Duke Leopold of Tuscany promulgated a penal code which completely eliminated the death penalty.<sup>20</sup> Since this time, and especially in the last two decades, many countries have abolished the death penalty, either for all offenses<sup>21</sup>

13. DEATH PENALTY FOR CRIMES COMMITTED BY PERSONS BELOW 18 YEARS OF AGE, *supra* note 5. The United States has executed nine juveniles, while Iraq has executed thirteen over the past ten years. *Id.*

14. See generally Schabas, *supra* note 6, at 26.

15. See, e.g., NAACP, *supra* note 10.

16. 3 THUCYDIDES, THE HISTORY OF THE PELOPONNESIAN WAR 25-50 (3rd ed. 1971).

17. C.H.S. Jawawardene, *The Death Penalty in Ceylon*, 3 CEYLON J. HIST. SOC. STUD. 166, 184 (1960).

18. AMNESTY INTERNATIONAL, WHEN THE STATE KILLS . . . THE DEATH PENALTY: A HUMAN RIGHTS ISSUE 72 (1989) [hereinafter WHEN THE STATE KILLS].

19. *Id.* The book contained the first sustained, systematic critique of the death penalty. *Id.* Beccaria stated in 1764 that "[t]he death penalty cannot be useful because of the example of barbarity it gives men . . . [In addition,] [i]t seems absurd that the laws, which are expressions of the public will, which detest and punish homicide, should themselves commit it." CESARE BECCARIA, ON CRIME AND PUNISHMENT 50 (1963).

20. WHEN THE STATE KILLS, *supra* note 18.

21. See AMNESTY INTERNATIONAL, THE DEATH PENALTY LIST OF ABOLITIONIST AND RETENTIONIST COUNTRIES, *supra* note 5. The countries that have abolished the death penalty for all offenses, and the year in which abolition was made mandatory, include Venezuela

or for ordinary crimes.<sup>23</sup>

### B. *Current International Law*

There are a variety of international laws which affect the death penalty. The Universal Declaration of Human Rights, adopted in 1948, predicted the abolition of the death penalty.<sup>23</sup> Likewise, the nine safeguards adopted by resolutions of the Economic and Social Council of the United Nations<sup>24</sup> established rules that limited the imposition of the death penalty on juveniles and the mentally disordered. It further declared that the death penalty may only be used when the guilt of the person charged is based upon "clear and convincing evidence."<sup>25</sup>

The Sixth Protocol to the European Convention on Human Rights<sup>26</sup> has been recognized by the European Court of Human Rights<sup>27</sup> as virtually a consensus, completely abolishing the death penalty for peacetime offenses.<sup>28</sup> Any member state of the Council of Europe may become a party to this treaty.<sup>29</sup>

The Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty<sup>30</sup> (hereinafter "ICCPR") enables countries to insist upon the abolition of the death penalty as part of their international human rights obligations.<sup>31</sup> The death penalty was the only issue

(1863), Portugal (1976), Denmark (1978), Luxembourg (1979), Nicaragua (1979), Norway (1979), France (1981), Netherlands (1982), Australia (1985), Haiti (1987), Liechtenstein (1987), German Democratic Republic (1987), Cambodia (1989), New Zealand (1989), Romania (1989), Slovenia (1989), Andorra (1990), Croatia (1990), the Czech and Slovak Federal Republic (1990), Hungary (1990), Ireland (1990), Mozambique (1990), Namibia (1990), Sao Tome and Principe (1990), Angola (1992), Switzerland (1992), Gambia (1993), Greece (1993), Guinea-Bissau (1993), and Hong Kong (1993). *Id.*

22. *Id.* Those states which have abolished the death penalty for ordinary crimes include Canada (1976), Spain (1978), Brazil (1979), Fiji (1979), Peru (1979), Cyprus (1983), El Salvador (1983), Argentina (1984), Australia (1984), Nepal (1990), Paraguay (1992). *Id.*

23. U.N. GAOR, 4th Sess., Supp. No. 217A, at 71, U.N. Doc. A/810 (1948).

24. *Id.*

25. *Id.*

26. Council of Europe: Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, 22 I.L.M. 538 (1985).

27. *Soering v. United Kingdom*, 1981 P.C.I.J. (ser. A) No. 161.

28. *WHEN THE STATE KILLS*, *supra* note 18, at 82. This is the first peace time treaty abolishing the death penalty for peace time offenses. *Id.* at 83.

29. *Id.* Article 1 of the Protocol states that the death penalty shall be abolished and that no one shall be condemned to such penalty or execution. *Id.* at 83-84. Article 2 states that the only exception to Article 1 can be in time of war or imminent threat of war. *Id.* at 84.

30. Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty (1990), *reprinted in* 29 I.L.M. 1464 (1992) [hereinafter Second Optional Protocol to the ICCPR].

31. *Schabas*, *supra* note 6, at 24. No one shall be deprived of his life intentionally except in the execution of a sentence of a court following a conviction of a crime for which this

that the United Nations addressed within this international human rights treaty.<sup>32</sup>

Article Six of the ICCPR has been established as a minimum standard of legal guarantees for the protection of a person's right to life by the United Nations Human Rights Committee and by the United Nations General Assembly.<sup>33</sup> However, the United States' Government interprets that Article 6 of the ICCPR to permit capital punishment.<sup>34</sup> The Convention on the Rights of the Child (hereinafter "CRC") and the Second Optional Protocol to the ICCPR both legislate that a contracting state is obligated to prevent executions of persons for crimes committed when below eighteen years of age.<sup>35</sup>

### III. THE UNITED STATES

Today, the majority of the people in the United States favor the use of capital punishment and the retention of the death penalty.<sup>36</sup> Surveys show that in the mid-1960s, only thirty-eight percent of the public were in favor of the death penalty, compared to seventy-six percent who supported the death penalty in 1991.<sup>37</sup> This trend represents continually growing support for capital punishment in the U.S.

#### A. *The Proliferation of the Death Penalty*

Brought to the United States by European settlers, the death penalty has been available since colonial days.<sup>38</sup> During the mid-nineteenth century, only five states, Iowa, Maine, Michigan, Rhode Island, and Wisconsin, abolished the death penalty.<sup>39</sup> Through the years, the United States has developed a variety of laws permitting the execution of its citizens.<sup>40</sup> The United States presently is the only country in the world with more than three means of administering a death penalty, permitting executions by hanging, shooting, electrocution, gas, and lethal injection.<sup>41</sup>

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penalty is provided by law. *WHEN THE STATE KILLS*, *supra* note 18, at 83.

32. *Id.* at 23.

33. David Weissbrodt, *International Measures Against Arbitrary Killings by Governments*, 77 AM. SOC. INT'L L. 378, 379-80 (1983).

34. Bacre Waly Ndiaye, *The U.S., the U.N., and Arbitrary Executions*, in AMNESTY INTERNATIONAL, *THE MACHINERY OF DEATH: A SHOCKING INDICTMENT OF CAPITAL PUNISHMENT IN THE UNITED STATES* 198, 201 (1995).

35. *DEATH PENALTY FOR CRIMES COMMITTED BY PERSONS BELOW 18 YEARS OF AGE*, *supra* note 5.

36. Ndiaye, *supra* note 34, at 198.

37. Louis Harris, *The Harris Survey*, Feb. 7, 1977, CHI. TRIB., at C3, cited in NICOLETTE PARISI, *SOURCEBOOK ON CRIMINAL JUSTICE STATISTICS*: 1978 326 (1979).

38. Schwarzschild, *supra* note 11, at 8.

39. HUGO BEDAU, *THE DEATH PENALTY IN AMERICA* 21 (1982).

40. AMNESTY INTERNATIONAL, *Methods of Execution Provided in Law*, Chart Prepared by Amnesty International (1994).

41. *Id.*

Between January 1, 1973, and April 20, 1994, there have been 232 executions within the United States.<sup>42</sup> There are nearly 3000 people on death row within the United States today, and approximately 200 to 250 people added to this total every year.<sup>43</sup>

There are only fourteen United States jurisdictions without capital punishment statutes.<sup>44</sup> Unlike individual states, the federal government has not completely reviewed the death penalty. Under current U.S. federal law the death penalty is available for peacetime espionage by individuals subject to the Uniform Code of Military Justice,<sup>45</sup> drug related murders under the 1988 Drug Abuse Act,<sup>46</sup> and murder under the United States Military Code.<sup>47</sup> Federal law has been struggling with whether the death penalty should be reviewed broadly, made available for first degree murder, or used only for specific crimes such as treason, espionage, and mail bombings.<sup>48</sup>

### B. *The Continued Expansion and Implementation of the Death Penalty*

Even when faced with international opposition, the United States did not fully adopt the ICCPR.<sup>49</sup> The United States made reservations to Article 6, which addresses the death penalty, and to Article 7, which addresses protection against torture.<sup>50</sup> It was the only country to submit a

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42. NAACP, *supra* note 10.

43. Schwarzschild, *supra* note 11, at 4. In recent years no more than thirty people a year have been executed, and the largest number ever executed in the U.S. is 199 in 1935. U.S. DEPARTMENT OF JUSTICE, BUREAU OF STATISTICS BULLETIN: CAPITAL PUNISHMENT 12 (1991). The number of people in the U.S. prisons and jails have also been increasing yearly with over 1,390,000 people in custody in 1993. See BUREAU OF JUSTICE STATISTICS, PRISONS IN 1993 BULLETIN 231 (1994) (providing total number of federal and state prisoners on December 31, 1993 as 948,881). See also BUREAU OF JUSTICE STATISTIC, JAIL INMATES 1992 432 (1993) (providing total number of jail inmates on June 30, 1992 as 444,584).

As of April 1994, thirty-nine U.S. jurisdictions have capital punishment statutes with a total of 2,848 inmates on death row. NAACP, *supra* note 10. These jurisdictions are Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wyoming, the U.S. Government, and the U.S. Military. *Id.*

44. *Id.* These jurisdictions are Alaska, District of Columbia, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. *Id.*

45. 10 U.S.C. § 918.

46. 21 U.S.C. § 848(1).

47. 10 U.S.C. § 918.

48. Diann Yvonne Rust-Tierney, *The United States Government and the Death Penalty*, in AMNESTY INTERNATIONAL, *THE MACHINERY OF DEATH: A SHOCKING INDICTMENT OF CAPITAL PUNISHMENT IN THE UNITED STATES* 49, 50 (1995).

49. Second Optional Protocol to the ICCPR, *supra* note 30.

50. *Multilateral Treaties, Reservations, Understandings, and Declarations*, deposited with the Secretary General, Status of December 31, 1992, at page 132.

reservation to Article 6,<sup>51</sup> demonstrating the United States's strong desire for continued use of the death penalty. The ratification of a treaty with reservations can drastically reduce any received benefit of the treaty. Eleven countries have already formulated direct objections to the United States's reservations.<sup>52</sup>

When the United States refused to adopt the Second Optional Protocol to the ICCPR, it joined countries notorious for their human rights violations, such as Iran, Iraq, and China.<sup>53</sup> Only after the United States was able to make a reservation to the section calling for the abolition of the death penalty for those under the age of eighteen was the Covenant ratified.<sup>54</sup>

With almost no exceptions, the United States Government has been in strong support of the death penalty with heightened advocacy under the Bush administration which promoted the death penalty for over fifty crimes.<sup>55</sup> Such a large expansion of the death penalty may even violate the Supreme Court's mandate that the death penalty be applied narrowly.<sup>56</sup> The Clinton administration also outwardly supports the death penalty and is continuing Bush's death penalty agenda.<sup>57</sup> In addition, many members of the newly-elected Republican Congress strongly support the death penalty, exemplifying the Republicans' determination to be tough on crime.<sup>58</sup>

The U.S. Federal Government has even been aggressively attempting to expand the application of the death penalty. Recently, there has been a strong movement to extend the availability of the death penalty to non-homicide crimes, especially for drug related offenses.<sup>59</sup> Under the Bush administration, several arguments were constructed to support the death penalty for non-homicidal crimes.<sup>60</sup> As drug-related crimes have increased in the United States, many lawmakers have considered it to be politically expedient to propose the death penalty for drug related crimes in direct

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51. DEATH PENALTY FOR CRIMES COMMITTED BY PERSONS BELOW 18 YEARS OF AGE, *supra* note 5.

52. Schabas, *supra* note 6, at 27.

53. Hood, *supra* note 1, at 175. The Second Optional Protocol to the ICCPR was initially opposed by the U.S. in 1989. *Id.*

54. *Id.* at 176.

55. *Bush Administration's Comment on the Comprehensive Violent Crime Control Act of 1991*, at 2.

56. *Gregg v. Georgia*, 428 U.S. at 153.

57. Rust-Tierney, *supra* note 48.

58. Ronald Hampton, *The Death Penalty: Racial Bias, Cost, and the Risk of Executing the Innocent*, in AMNESTY INTERNATIONAL, *THE MACHINERY OF DEATH: A SHOCKING INDICTMENT OF CAPITAL PUNISHMENT IN THE UNITED STATES* 101, 110 (1995). "The driving force behind the death penalty in this country are politicians whom use the issue in an attempt to appear tough on crime." *Id.*

59. See Title II of H.R. 3355; Title VII of H.R. 4092 (103rd Congress).

60. *Hearings before the Subcommittee on Crime of the Committee on the Judiciary (House of Representatives)* 100th Cong. (March 14, 1990) (testimony of Williams Barr, Assistant Attorney General, Office of Legal Council, U.S. Department of Justice).



opposition to the Supreme Court's ruling that the death penalty only be implemented for homicides.<sup>61</sup> This is another example of repeated pressure to expand the death penalty beyond the scope set by the Supreme Court<sup>62</sup> and well beyond the international standards followed by most of the countries in the world.

#### IV. VIOLATIONS OF INTERNATIONAL LAW

At the same time that the United States demands countries around the world to comply with United Nations resolutions and international laws, there are several circumstances in which the United States refuses to fully adhere to the weight of the international community's convictions. When the United States has made a reservation to every clause associated with the death penalty in Article 6 and 7 of the ICCPR, it effectively disregarded the intent and purpose of the treaty.<sup>63</sup> Thus, when the United States executed five juvenile offenders after the ICCPR became effective, the United States was considered by many countries to have violated customary international law.<sup>64</sup>

The United States is not the only country to violate international law and permit the execution of juveniles. Five other countries have violated either the ICCPR, the CRC, or both, within the past ten years.<sup>65</sup> These countries are Bangladesh, Iran, Iraq, Pakistan, and Yemen.<sup>66</sup>

Out of the 184 member states of the United Nations, eleven countries have implemented, but not used, independent state legislation which expressly permits the execution of individuals for crimes committed when below the age of 18.<sup>67</sup> These countries are Chile, China, Congo, Cyprus, Israel, Mauritania, Morocco, Nigeria, Thailand, Zaire, and Zimbabwe.<sup>68</sup> Since all of these countries have adopted either the ICCPR, the CRC, or both, each country would be in violation of their treaty commitments if their national death penalty laws were ever used.

In addition, Amnesty International claims that the United States breached several of the nine safeguards adopted by resolution of the Economic and Social Council of the United Nations.<sup>69</sup> Since the quality of

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61. *Coker v. Georgia*, 433 U.S. 584 (1977).

62. *Id.*; *Gregg v. Georgia*, 428 U.S. at 153.

63. Inter-American Court of Human Rights; Restrictions to the Death Penalty (Art. 4 sec. 2 and art. 4 sec. 4 *American Convention on Human Rights*) Advisory Opinion O.C. 3/83 of September 8, 1983, Series A, No. 3, H.R.L.J. 352, 70 I.L.R. 449.

64. *Id.* at 27, 28.

65. DEATH PENALTY FOR CRIMES COMMITTED BY PERSONS BELOW 18 YEARS OF AGE, *supra* note 5.

66. Amnesty International, *Death Penalty News*, March 1994, at 3. Iran has even implemented stoning as a death penalty for crimes which do not include killing another individual. *Id.*

67. DEATH PENALTY FOR CRIMES COMMITTED BY PERSONS BELOW 18 YEARS OF AGE, *supra* note 5.

68. *Id.*

69. Hood, *supra* note 1, at 176.

defense attorneys available to indigent defendants has been classified as substandard, Amnesty International has stated that the United States violated the international standards of human rights outlined in the nine safeguards.<sup>70</sup>

## V. RATIONALE FOR THE DEATH PENALTY?

The morality of implementing a death penalty has been repeatedly questioned by organizations such as Amnesty International.<sup>71</sup> These organizations contend that the use of the death penalty violates fundamental human rights and that governments should not use homicide as an instrument of social policy.<sup>72</sup> Even the European Court of Human Rights declared the wait for execution on death row as cruel, inhuman, and degrading.<sup>73</sup>

In contrast, the United States Government has emphatically declared that capital punishment does not violate a person's inalienable right to life or constitute cruel, inhuman, or degrading punishment.<sup>74</sup> The Government claims that in a democratic society, the will of the people of each state must be followed when determining a society's penal laws and sanctions.<sup>75</sup> In determining the validity of capital punishment, it is important to weigh the pronounced reasons for the implementation of a death penalty against the resulting inequities.

### A. *Justification of the Death Penalty*

Some countries contend that it is necessary to administer a death penalty in times of war or to suppress political opposition. As Europe was concluding war crime trials following World War II, the European Convention on Human Rights<sup>76</sup> was adopted, but the use of the death penalty was still permitted.<sup>77</sup> In a significant move, the United Nations opposed the use of the death penalty even for war crimes.<sup>78</sup> A decision within the International War Crimes Tribunal,<sup>79</sup> established by the United Nations for war crimes in the former Yugoslavia, specifically states that the death

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70. *Id.*

71. Schwarzschild, *supra* note 11, at 5.

72. *Id.* Amnesty International considers the death penalty to be akin to torture. Matas, *supra* note 5. There are examples of botched executions. *Id.* In one case, an individual's head caught on fire, and in another case, an electrocution took nineteen minutes. *Id.*

73. Soering v. United Kingdom, *supra* note 27.

74. Ndiaye, *supra* note 34.

75. *Id.*

76. Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 (1955).

77. Schabas, *supra* note 6, at 25.

78. Matas, *supra* note 5, at 35 (stating that for the ex-Yugoslav war, the "United Nations refused to impose the death penalty for the worst crimes imaginable, including genocide." *Id.*).

79. Statute of the International Tribunal, S.C. Res. 827 (1993).

penalty would not be an option for resolution of these crimes.<sup>80</sup> This demonstrates that even for the most brutal possible crimes, the highest international organization is no longer willing to implement the death penalty. This action may set a precedent for future Tribunals on war crimes and help to diminish justification of the death penalty. Presently, there are fifteen countries which have abolished the death penalty except for exceptional crimes, such as crimes under military law or crimes committed during wartime.<sup>81</sup> These countries are Argentina, Brazil, Canada, Cyprus, El Salvador, Fiji, Israel, Italy, Malta, Mexico, Paraguay, Peru, Seychelles, Spain, and the United Kingdom.<sup>82</sup>

It is often after countries see the misuse of the death penalty that it is abolished. Countries such as Argentina, Brazil, Haiti, Nicaragua, Peru, and the Philippines have eliminated the death penalty after emerging from periods of political repression.<sup>83</sup>

Deterrence has been one of the most prevailing arguments in favor of the death penalty, but the small percentage of culpable homicides for which the death penalty has been implemented is too small to deter future crimes.<sup>84</sup> With the probability of being executed for a culpable homicide being, at the most, one in one thousand, any possible deterrence effect has been negated.<sup>85</sup> In addition, only one in ten defendants eligible for the death penalty have been sentenced to death, and only a fraction of those are ever even executed.<sup>86</sup>

There are some classifications which are almost universally excluded from the death penalty. Virtually all countries in the world do not permit the execution of the insane.<sup>87</sup> In the United States, as an example, the Supreme Court pronounced that the execution of the insane is unconstitutional.<sup>88</sup>

#### B. *Disparities with the Death Penalty in the United States*

The administration of the death penalty has proven to be riddled with inherent inequities, but the United States remains determined to

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80. Schabas, *supra* note 6, at 26.

81. DEATH PENALTY FOR CRIMES COMMITTED BY PERSONS BELOW 18 YEARS OF AGE, *supra* note 5.

82. *Id.* None of these countries has used the death penalty within the past ten years. *Id.*

83. WHEN THE STATE KILLS, *supra* note 18, at 73.

84. Hood, *supra* note 1, at 177. Mr. Hood, the Director of the Center for Criminological Research, stated that "the review of the literature on deterrence which I carried out for the United Nations convinced me that the probability of execution for a homicide is so low in the U.S. that it could not have other than a symbolic purpose." *Id.*

85. *Id.*

86. U.S. DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS: 1992, 539 (1992).

87. Schabas, *supra* note 6, at 25.

88. Ford v. Wainwright, 477 U.S. 399 (1986).

continue its implementation.<sup>89</sup> Even after the Supreme Court took steps to eliminate any arbitrary or discriminatory administering of a death penalty,<sup>90</sup> the death penalty law continues to be irrational and discriminatory.<sup>91</sup> Within the United States there has been the execution of the innocent,<sup>92</sup> of children,<sup>93</sup> of the mentally retarded,<sup>94</sup> and the mentally ill.<sup>95</sup>

The most prominent disparity stems from the percentage of African-Americans being executed. Supreme Court Justice Blackmun has stated, "[e]ven under the most sophisticated death penalty statutes, race continues to play a major role in determining who shall live and who shall die."<sup>96</sup> Of the 2,848 inmates on death row in the United States, almost fifty percent are White and almost forty percent are African-American.<sup>97</sup> Seventeen, or fifty-two percent, of the thirty-three juvenile offenders on death row, are African-American.<sup>98</sup> Of the 4,016 people executed in the United States between 1930 and 1990, 2,129, or fifty-three percent, were African-American.<sup>99</sup>

The statistics of African-American executions for crimes committed in conjunction with rape are even more alarming. Ninety percent, or 405 of the 455 men executed for rape within the United States between 1930 and 1976, have been African-American.<sup>100</sup> Under the new 1988 Drug Abuse Act, there has been thirty-seven prosecutions for drug related murders, and all but four of these people have been African-American or people of color.<sup>101</sup> With the national African-American population in the United States hovering around twelve percent, it becomes apparent that

89. Matas, *supra* note 5, at 33 (stating that the "death penalty by its very nature is arbitrary, discriminatory, and racist." *Id.*). "To talk of a death penalty that is not cruel and unusual is an oxymoron, a self contradiction." *Id.*

90. *Gregg v. Georgia*, 428 U.S. at 153.

91. Schwarzschild, *supra* note 11, at 5.

92. Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 73 (1973) (mentioning several examples such as James Adams who was executed in Florida in 1984).

93. *Rumbaugh v. Texas*, 629 S.W.2d 747.

94. *Dunkins v. Alabama*, 489 So.2d 603 (1978).

95. *Louisiana v. Prejean*, 379 So.2d 240 (1975), *cert. denied*, 499 U.S. 891, 66 L.Ed. 119, 101 S.Ct. 253 (1980).

96. *Callins v. Callins*, No. 93-7054 (1994) (Blackmun, J., dissenting).

97. NAACP, *supra* note 10. Of the 2,848 death row inmates, 1,423 (49.96%) are White, 1,138 (39.96%) are Black, 208 (7.30%) are Latino/Latina, 50 (1.75%) are Native American, 20 (0.70%) are Asian, and 9 (0.32%) are unknown. *Id.*

98. VICTOR L. STREIB, *THE JUVENILE DEATH PENALTY TODAY: PRESENT DEATH ROW INMATES UNDER JUVENILE DEATH SENTENCES AND DEATH SENTENCES AND EXECUTIONS FOR JUVENILE CRIMES* 6 (1993); Rev. Fred Taylor, *Race, Youth, Poverty and the Death Penalty*, in AMNESTY INTERNATIONAL, *THE MACHINERY OF DEATH: A SHOCKING INDICTMENT OF CAPITAL PUNISHMENT IN THE UNITED STATES* 88 (1995). "It is no coincidence that the death penalty in the U.S. is strongest in the former slave states, the states of the old Confederacy." Matas, *supra* note 5, at 33.

99. U.S. DEPARTMENT OF JUSTICE, *CORRECTIONAL POPULATIONS IN THE U.S.* 134 (1991).

100. *Id.*

101. Rust-Tierney, *supra* note 48.

there is a disproportionate large number of African-American being executed.<sup>102</sup>

Furthermore, there have been far more African-Americans executed for the murder of Whites, than Whites executed for the murder of African-Americans. Since capital punishment was reinstated in 1976, only one White defendant has been executed for killing a non-White victim.<sup>103</sup>

Homicides committed against African-Americans fail to receive the same ratio of executions, as do homicides committed against Whites.<sup>104</sup> Even with nearly one half of all homicide victims being African-American, eighty-five percent of the individuals executed within the United States since 1972 were convicted of killing White victims.<sup>105</sup> The United States General Accounting Office has specifically stated that someone who murders a White individual is more likely to receive the death penalty than someone who murders an African-American.<sup>106</sup>

An additional death penalty imbalance within the United States stems from the seeming low-quality of court appointed counsel. A large percent of the defendants subjected to the death penalty are indigent.<sup>107</sup> Their lawyers are assigned by the court and are paid extremely low wages, in some states no more than \$1600 per case.<sup>108</sup> With the estimated counsel time needed to adequately represent a defendant subject to the death penalty ranging from 800 to 1000 hours, some state appointed attorneys earn approximately \$2.00 an hour.<sup>109</sup> Any hourly wage remotely near this level does not afford an indigent defendant adequate representation.

Finally, there are documented cases of evidence being produced to vindicate an individual who has already been executed or who was on death row awaiting execution.<sup>110</sup> In 1987, researchers documented 350

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102. Hampton, *supra* note 58.

103. NAACP, *supra* note 10.

104. *Id.*

105. Hampton, *supra* note 58, at 102. "This sends a clear message that when people of color — particularly black people — are killed, whether as victims of private or state-sanctioned homicide, the cost to society is hardly as great as when whites are killed." *Id.*

106. U.S. GENERAL ACCOUNTING OFFICE, DEATH PENALTY SENTENCING 5 (1990). "The race of the victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found more likely to be sentenced to death than those who murdered blacks." *Id.* (emphasis added).

107. Matas, *supra* note 5, at 37. Nearly all of the over 2,800 people on death row are poor. Hampton, *supra* note 58, at 101.

108. Matas, *supra* note 5.

109. *Id.* The number of lawyers willing to work these hours are few. *Id.* Defense counsel needs to be paid a reasonable remuneration to ensure an effective defense. *Id.*

110. Hampton, *supra* note 58, at 103. "No matter how careful courts are, the possibility of perjured testimony, mistaken honest testimony, and human error remains all too real. We have no way of judging how many innocent persons have been executed, but we can be certain that there were some." *Furman*, 404 U.S. at 367-68.

In 1993, the number one concern raising doubts among voters regarding the death penalty is the danger of a mistaken execution. *Id.*

cases in which 325 defendants, whose guilt was in serious doubt, were convicted of murder; 119 of them were sentenced to death.<sup>111</sup> Cases such as these have lead to erroneous convictions, as was the conviction of Kirk Bloodsworth who served nine years on death row in New York until a DNA test established his innocence.<sup>112</sup> Walter McMilliam spent five years on death row in Alabama until it was proven he did not commit the crime.<sup>113</sup>

Throughout this century, in every jurisdiction except for six or seven states, innocent people have been sentenced to death.<sup>114</sup> Since 1973, at least forty-eight people have been released from prison after serving time on death row.<sup>115</sup> Forty-three of these defendants were acquitted, pardoned or had the charges against them dropped.<sup>116</sup> A Staff Report for the Subcommittee on Civil and Constitutional Rights stated that "[t]hese forty-eight cases illustrate the flaws inherent in the death sentencing systems used in the states."<sup>117</sup> Low attorneys' salaries and racial prejudice are factors in wrongful convictions and perpetuate the inequities with the death penalty.

## VI. CONCLUSION

Under the Clinton administration, the Federal Government of the United States is poised to expand the death penalty to more than sixty crimes.<sup>118</sup> With the new Republican Congress, there is no reason to suspect any change in this progression. Considering the world's steady move towards the abolition of the death penalty, the United States must reevaluate its role as a global leader and as an advocate of human rights if it allows the death penalty to continually thrive.

Since the administration of the death penalty is saturated with errors, it is illogical for the United States to continue to execute offenders.

111. Bedau & Radelet, *supra* note 92, at 38.

112. Hampton, *supra* note 58, at 103.

113. *Id.*

114. Hugo Adam Bedau, *Innocence and the Death Penalty*, in AMNESTY INTERNATIONAL, *THE MACHINERY OF DEATH: A SHOCKING INDICTMENT OF CAPITAL PUNISHMENT IN THE UNITED STATES* 98 (1995). "In particular, many of these cases, approximately two dozen, involve rescue from the execution chamber with less than three days to spare. In several cases, as recently as the past decade, there have been people within hours of execution under law who were not executed, and it was later established that they were innocent." *Id.*

115. *Innocence and the Death Penalty: Assessing the Danger of Mistaken Executions*, STAFF REPORT ISSUED BY THE SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS COMMITTEE ON THE JUDICIARY, ONE HUNDRED THIRD CONGRESS, FIRST SESSION 2 (October 21, 1993).

116. *Id.* In three of these cases, a compromise was reached and the defendants were immediately released upon pleading to a lesser offense. In the remaining two cases, one defendant was released when the parole board became convinced of his innocence, and the other was acquitted at a retrial of the capital charge but convicted of lesser related charges. *Id.*

117. *Id.* at 8. Racial prejudice was considered a determining factor. *Id.*

118. H.R. 3355; H.R. 4092. The Federal Omnibus Crime bills from the 103rd Congress were passed by Congress on August 25, 1994. *Id.*

The United States must explore other alternatives to capital punishment. Although three out of four Americans say they favor the death penalty, the support drops to one in four if a state could impose a life sentence without parole and require offenders to work in prison for money that would go to families of victims.<sup>119</sup>

The political will to abolish the death penalty ultimately comes from within a country. International human rights treaties establish restrictions and safeguards on the use of the death penalty in countries which have not abolished it; however, these treaties have been violated and are insufficient. A better international perspective could stem the tide of support for capital punishment in the United States and assist the United States in joining the global flow of countries who have abolished the death penalty.

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119. Williams J. Bowers, *Popular Support for the Death Penalty: Mistaken Beliefs*, in AMNESTY INTERNATIONAL, *THE MACHINERY OF DEATH: A SHOCKING INDICTMENT OF CAPITAL PUNISHMENT IN THE UNITED STATES* 70 (1995).

In New York we found that 71 percent of our respondents said they "favored" capital punishment, but only 19 percent said they would stick with the death penalty if the alternative was life without parole plus restitution. In Nebraska, where 80 percent initially "favored" the death penalty, only 26 percent would stick with it if given this alternative. These 52 and 54 percentage points drop in death penalty support are strong indications that people are merely giving lip service to the death penalty in the public opinion polls-cited by the Supreme Court in its *Gregg* decision as indication that Americans want capital punishment. *Id.* at 70-71.

"[P]ublic support for capital punishment is an illusion that has become a self-perpetuating myth." *Id.* at 73.